

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 07-265L

(Filed: January 8, 2008)

KERMIT A. BELGARDE, also known as
KERMIT REDEAGLE-BELGARDE,
pro se,

Plaintiff,

v.

UNITED STATES,

Defendant.

ORDER

This is an Indian trust case. Pending before the court are motions by the government to dismiss the Complaint and the Amended Complaint filed by plaintiff, Mr. Belgarde. The government seeks dismissal both for lack of subject matter jurisdiction, invoking Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”), and for failure to state a claim upon which relief could be granted, citing RCFC 12(b)(6). Mr. Belgarde has responded to the government’s motions by filing oppositions and by submitting a Second Amended Complaint. For the reasons stated, the government’s motions to dismiss are denied as moot in light of Mr. Belgarde’s submission of a Second Amended Complaint.

BACKGROUND

This action is closely related to, but not a part of or consolidated with, *Wolfchild v. United States*, No. 03-2684L, an Indian trust case in which this court has certified two questions of law for review by the Court of Appeals for the Federal Circuit, *see Wolfchild v. United States*, 78 Fed. Cl. 472 (2007), and in which the Federal Circuit has granted the ensuing petition for interlocutory appeal. *See Wolfchild v. United States*, Misc. Docket No. 861 (Fed. Cir. Dec. 10, 2007) (order granting permission to appeal). The questions now pending before the Court of Appeals in *Wolfchild* are:

(1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriation Acts for the benefit of the

loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and

(2) If the Appropriation Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

Wolfchild, 78 Fed. Cl. at 485.¹ *Wolfchild* has been brought by approximately 20,750 individuals claiming descent from persons who were members of the Mdewakanton band of Sioux Indians and who assisted white settlers in Minnesota during the 1862 Sioux uprising (“the loyal Mdewakanton”).

Mr. Belgarde and unidentified relatives initially sought to intervene in the *Wolfchild* case. By an order in that case dated April 27, 2007, this court granted Mr. Belgarde leave to intervene notwithstanding the government’s objection that his motion was untimely. *See* Order Respecting Belgarde Motion For Intervention, *Wolfchild v. United States*, No. 03-2684L (Fed. Cl. Apr. 27, 2007). However, Mr. Belgarde’s relatives were not allowed to intervene because they had not been identified with particularity and because RCFC 83.1(c)(8) bars a *pro se* party from representing individuals other than “immediate relative[s].” *Id.* Further, to forestall prejudice to the parties to the *Wolfchild* case, Mr. Belgarde’s intervention was severed from the *Wolfchild* action, and his claim as an intervening plaintiff was deemed to constitute a new, independent action in this court. *Id.*

Thereafter, the government filed its motion to dismiss Mr. Belgarde’s independent action. *See* Def.’s Mot. to Dismiss (docket no. 5). Mr. Belgarde thereupon filed his Amended Complaint (docket no. 7), and several days later he filed a revision to that Amended Complaint (docket no. 8). The government then filed a second motion to dismiss relating to Mr. Belgarde’s Amended Complaint (as revised) (docket no. 11) and Mr. Belgarde responded with oppositions to the government’s motion to dismiss (docket nos. 17 and 20) and by proffering a Second Amended Complaint.

ANALYSIS

“A party seeking the exercise of jurisdiction in [his] favor has the burden of establishing that such jurisdiction exists.” *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)). In determining whether it has jurisdiction over a case under RCFC 12(b)(1) or 12(b)(6), a federal court must accept as true the facts alleged in the complaint and draw reasonable inferences in favor of the plaintiff. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (citing *Sheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974)). However, the court need not accept as true unreasonable inferences, unwarranted

¹The “1980 Act” refers to the Act of December 19, 1980, Pub. L. No. 96-557, 94 Stat. 3262, which converted interests of the United States in the property at issue to a holding in trust for three Indian communities located in Minnesota.

deductions of fact, or conclusory legal allegations cast in the form of factual averments. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1959 (2007) (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.”).

Jurisdiction over a claim against the United States requires a waiver of sovereign immunity and the existence of a cause of action that falls within the scope of that waiver. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). Such a waiver may not be inferred, but must be “‘unequivocally expressed.’” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (“*Mitchell I*”) (quoting *United States v. King* 395 U.S. 1, 4 (1969)). The Tucker Act and the Indian Tucker Act both constitute such waivers, but any invocation of jurisdiction under those Acts must be accompanied by a corresponding substantive claim that “can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” *United States v. Mitchell*, 463 U.S. 206, 217 (1983) (“*Mitchell II*”) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

In this instance, Mr. Belgarde’s initial Complaint and his revised Amended Complaint simply refer to the *Wolfchild* case, aver that Mr. Belgarde is a lineal descendant of a loyal Mdewakanton as established by birth and death certificates, and pray that he should be accorded the same treatment as the plaintiffs in the *Wolfchild* case. Compl. at 2-3; Am. Compl. at 3-5. The government objects that Mr. Belgarde’s recitations do not constitute a “short and plain” statement of both the basis of claiming jurisdiction in this court and the facts upon which his claim is based, as required by RCFC 8. Def.’s Mot. to Dismiss at 4-5.

The government’s objections are well taken, at least insofar as Mr. Belgarde’s original Complaint and his revised Amended Complaint are concerned, even though the court gives significant leeway to *pro se* plaintiffs. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (“[P]*ro se* complaint . . . h[e]ld to less stringent standards than formal pleadings drafted by lawyers.”). Nonetheless, as the government points out, a generous interpretation of a *pro se* complaint does not mean that abject failures should be excused. Def.’s Mot. to Dismiss at 10 (citing *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)). Mr. Belgarde may not simply refer to the *Wolfchild* action and then invite the court to construe that reference as a means of incorporating detailed allegations that establish this court’s jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505, and provide plausible grounds for according relief.

Accordingly, if the court only had before it Mr. Belgarde’s Complaint and revised Amended Complaint, the government’s motions to dismiss would be granted, while providing leave to Mr. Belgarde to amend his prior submissions. However, the court also has before it a motion by Mr. Belgarde for leave to file an amended complaint that “plead[s] more specific facts and allegations of breach of trust.” Pl.’s Mot. for Leave at 1. The proffered Second Amended Complaint describes the legal and factual bases for a trust, identifies the property constituting the corpus of the trust, sets out the grounds for inclusion of Mr. Belgarde among the beneficiaries of

the alleged trust, avers specific breaches by the government of its fiduciary duties under the trust, and provides a prayer for relief that is cognizable in this court. In short, the proffered Second Amended Complaint would rectify the shortcomings in Mr. Belgarde's prior pleadings. The court accordingly will grant leave for the filing of Mr. Belgarde's Second Amended Complaint² and deny the government's motions to dismiss as moot.

CONCLUSION

The government's motions to dismiss plaintiff's Complaint and his Amended Complaint are DENIED as moot. Plaintiff's motion for leave to file a Second Amended Complaint is GRANTED.³

It is so **ORDERED**.

Charles F. Lettow
Judge

²Mr. Belgarde's motion for leave to file the Second Amended Complaint, with the appended Second Amended Complaint itself, was stamped by the clerk's office as having been received but not as having been filed. The basis for this action is not reflected in any accompanying memorandum, and the motion for leave is not listed on the court's docket. Based upon an examination of this submission, the reason for the lack of filing on the court's docket may be attributable to plaintiff's certificate of service. The certificate is deficient because it shows service upon the clerk and not upon counsel for the government. If the certificate is accurate, the government's counsel may never have received the submission. Consequently, the court directs the clerk to file the motion for leave and to serve the motion along with the appended Second Amended Complaint by attaching them to the copy of this order that is sent to government's counsel.

³Defendant's motion to strike plaintiff's second response to the motion to dismiss is DENIED.